

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Section 304 of the )  
Telecommunications Act of 1996 )

Commercial Availability of Navigation Devices )  
\_\_\_\_\_ )

CS Docket No. 97-80 /

**REPLY COMMENTS OF  
TIME WARNER CABLE**

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## Summary

Time Warner Cable submits these reply comments in response to the *Further Notice of Proposed Rule Making* relating to the commercial availability of navigation devices. In their comments responding to the FNPRM, the consumer electronics industry engaged in a wholly unfounded attack on the motivations of the cable industry and its monumental efforts towards achieving the pro-consumer goals of Section 629. This criticism is entirely self-serving and unjustified, and in no manner supports the extraordinary relief that the CE industry seeks. Quite the contrary, the cable industry has demonstrated a persistent commitment to the goal of commercial availability and has met or exceeded each and every specific milestone set by the Commission for the development and deployment of such devices. Most importantly, the cable industry has satisfied the Commission's challenge to meet the accelerated timetable for making PODs available to consumers. Further, in an open and inclusive process, CableLabs has provided the specifications necessary to build host devices to be offered at retail.

In response, manufacturers have since indicated that they are ready and willing to build POD-complaint host devices. All that is now lacking is for host devices to appear in retailer's showrooms so that consumers can actually purchase them. But deflecting from their unwillingness to provide consumers with the opportunity to purchase such devices, CE retailers blame the cable industry by incorrectly assenting that they are being threatened unfairly in the standards setting process. They thus appeal to the Commission to accelerate the 2005 deadline for phasing out integrated devices. Considering the lack of demonstrated effort by CE retailers, such a request is entirely irrational and demonstrates exceptional gall.

Rather than accelerating the ban and reducing consumer choice, the Commission should revisit its rules to ensure that consumers have a full range of navigation device options.

Assuming cable operators' continued compliance with the other aspects of the Commission's navigation device rules, consumers should continue to have the option of obtaining integrated devices from their cable operator after January 1, 2005. At a minimum, the Commission should make clear that a cable operator will not be prohibited from offering new integrated devices to subscribers if it continues to make PODs available to consumers who wish to obtain OpenCable-compliant host devices at retail.

Time Warner continues to believe that it is inappropriate for the Commission to micro-manage this process. To the extent, however, the Commission continues to regulate the cable industry in this context, such regulatory burdens should fall equally on all entities whose cooperation is necessary to achieve the objectives of Section 629. If continued regulatory oversight is deemed necessary, then the Commission should establish discreet milestones for the CE retailers to meet and should monitor the CE industry's progress through reporting obligations. Until the Commission finds that CE retailers have fulfilled their obligations in offering retail host devices, it cannot possibly blame the continued availability of integrated boxes from cable operators as impeding a fully competitive retail environment.

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**REPLY COMMENTS OF  
TIME WARNER CABLE**

Time Warner Cable ("Time Warner"), by its attorneys, submits these reply comments in response to the *Further Notice of Proposed Rule Making* in the above-captioned proceeding relating to the commercial availability of navigation devices.<sup>1</sup> In their comments responding to the *FNPRM*, the consumer electronics industry (the "CE industry"), primarily through the comments of their two trade associations, the Consumer Electronics Association ("CEA") and the Consumer Electronics Retailers Coalition ("CERC"), have engaged in a wholly unfounded attack on the motivations of the cable industry and its monumental efforts towards achieving the pro-consumer goals of Section 629.<sup>2</sup> As demonstrated below, this criticism is entirely self-serving and unjustified, and in no manner supports the extraordinary relief that the CE industry seeks.

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<sup>1</sup>*Further Notice of Proposed Rule Making and Declaratory Ruling*, CS Docket No. 97-80, FCC 00-341 (rel. September 18, 2000) ("*FNPRM*" or "*FNPRM and Declaratory Ruling*").

<sup>2</sup>47 U.S.C. § 549.

## **I. INTRODUCTION**

As was clearly demonstrated in the comments of NCTA, Time Warner, AT&T and others, the cable industry has demonstrated a persistent commitment to the goal of commercial availability and has met or exceeded each and every specific milestone set by the Commission for the development and deployment of such devices. Most importantly, the cable industry has satisfied the Commission's challenge to meet the accelerated timetable for making separate point of deployment security modules ("PODs") available to consumers. Further, in an open and inclusive process, CableLabs has provided the specifications necessary to build host devices to be offered at retail. Manufacturers have since indicated that they are ready and willing to build POD-compliant host devices. All that is now lacking is for host devices to appear in retailer's showrooms so that consumers can actually purchase them. This is something that only the retailers can control, and this is something that can be achieved immediately, even while efforts continue with respect to the development of interface standards for advanced services to be offered by cable operators in the future. Despite this, host devices remain conspicuously absent from retail shelves.

Deflecting from their current unwillingness to provide consumers with the opportunity to purchase such devices, CE retailers point the finger of blame at the cable industry, claim unfairness in the standards setting process, and appeal to the Commission to accelerate the 2005 deadline for phasing out integrated devices. Considering the lack of demonstrated effort by CE retailers, such a request is entirely irrational. As detailed in Time Warner's comments and further elaborated upon below, the Commission should not only reject such an acceleration, it must now repeal the 2005 deadline altogether. If the Commission does anything, it should

establish concrete goals and timelines for the CE retailers to meet, to ensure that store shelves are stocked with POD-compliant host devices so that consumers can actually purchase them.

## **II. THE CONSUMER ELECTRONICS INTERESTS HAVE FAILED TO PROVIDE ANY VALID JUSTIFICATION FOR ACCELERATION (AND EVEN THE MAINTENANCE) OF THE 2005 PHASE-OUT OF INTEGRATED BOXES**

The comments from the CE retailers utterly fail to make the case for the acceleration of the 2005 phase-out deadline. The CE retailers' sole justification for accelerating the 2005 phase-out of integrated boxes is to create "proper incentives" for the cable industry to accept standards in line with the retailers economic interests. The Commission should not be misled – this appeal is nothing more than a naked attempt by the CE retailers to increase their own leverage in the ongoing OpenCable standard setting process in order to dictate standards to the other affected parties.<sup>3</sup>

As indicated by their comments, the CE retailers' complaints about the standard setting process are twofold. First, the CE retailers complain that the process has failed to provide technical specifications to enable competitively offered host devices to deliver each and every possible interactive and non-interactive service that might be offered by cable operators, specifically those relating to future "bi-directional" or interactive features of host devices such as EPGs.<sup>4</sup> The plain fact is that CE manufacturers are free under the existing OpenCable

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<sup>3</sup>CEA comments at 6-8, 11-13; CERC comments at 6-7, 17-19.

<sup>4</sup>CEA comments at 11-13; CERC comments at 17-18; Gemstar comments at 2-8. With regard to Gemstar's allegations targeted at Time Warner involving EPG issues, Time Warner respectfully requests that the Commission address such issues in the proper proceeding and with the full record before it. Not only are the issues raised by Gemstar tangential to the issues in this proceeding, but given the fact that Time Warner systems are now passing through Gemstar EPG signals to subscribers, they are also moot.

specifications to build devices that incorporate any feature as long as the devices work with the services, features and functions offered by the purchaser's cable system and do not compromise signal security or cause harm to the network. Nothing about these standards limits or has limited CE manufacturers' ability to build "bi-directional" or interactive features into host devices.

Further, as this complaint has nothing to do with the services currently being offered by cable operators, and only with services that cable operators might provide sometime in the indefinite future, retailers' ongoing failure to stock POD-compliant host devices that work with the current cable system services is unjustifiable and an inadequate reason to accelerate the 2005 phase-out date. At most, it is merely a smokescreen for the CE retailers' desire to wait for the introduction of next generation devices and integrated DTV sets rather than make POD-compliant host set-top boxes available today. Indeed, the CE industry's arguments for the rollback of the 2005 deadline on the offering of integrated boxes, combined with their unwillingness to order POD-compliant host devices until that deadline takes effect, strongly suggest that its actions are not really a product of inadequate standards, but instead a desire not to have to compete against equipment that consumers may choose to lease rather than purchase.

Second, the CE industry repeats the tired refrain of unfairness over the imposition of copy protection requirements as a condition for licensing the POD-host interface technology, requirements included at the insistence of the content provider community over CE industry objections.<sup>5</sup> CableLabs has worked diligently to produce POD standards that not only are compatible with various cable system architectures, but also to take into account and balance the

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<sup>5</sup>CEA comments at 7; CERC comments at 21-22.



needs and interests of the various affected parties. The Commission has correctly confirmed that the content providers' interest in protecting their intellectual property deserves due consideration in the standards process,<sup>6</sup> and CableLabs in fact has just recently announced the final PHI license, thus putting to rest any further excuses by CE retailers based on the availability of such license.

It is utterly unfair and irrational to argue that the 2005 phase-out deadline be changed because of a matter in which the cable industry has not been a protagonist, and indeed has actively attempted to build consensus among content producers and CE interests. Because the CE industry is frustrated that it has yet to reach consensus with the content providers is no reason to accelerate the phase-out of integrated boxes to the detriment of the cable industry and consumers alike. The Commission must further be mindful that a developmental license has been available that would have permitted any manufacturer to develop a host device pending the license's finalization,<sup>7</sup> but not a single vendor took advantage of that developmental license or attempted to produce a prototype by the July 1 deadline.

Taking a step back, both of the complaints raised by the CE industry reflect nothing more than disappointment that their interests, while being fully considered in the standard-setting process, have been carefully balanced against the competing interest of other parties affected by

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<sup>6</sup>*FNPRM* at ¶¶ 25-32.

<sup>7</sup>See National Cable Television Association *ex parte* filing dated August 15, 2000 (submitting into the record NCTA's letter, dated August 15, 2000 to Honorable William J. Tauzin from Robert Sachs responding to CERC's Response to July 2000 Status Report) ("CableLabs has made available to manufacturers an 'evaluation' license for the technology – without the terms to which CERC objects – so they can develop, build and test set-top boxes pending signing a 'production' license enabling them to supply such boxes for retail sale.")

this process. Neither objection adequately explains the CE retailers' decision not to build and make available the first generation of host devices that comply with the new standards. Both complaints are undeniably self-serving, discount the need for consensus in development of standards, and merely express the CE industry's frustration at not being able to dictate the outcome of the standards process for its members economic benefit. In the end, the CE industry's dissatisfaction at not being able to unilaterally direct the CableLabs standardization process provides no justification for the efforts by CE retailers to restrict consumer's ability to choose between leasing or purchasing digital set-top boxes.

Section 629 must be read as being primarily concerned with consumer choice, not with ensuring the CE industry's success in launching new products. Indeed, from a pure consumer protection perspective, there is no reason to accelerate, or even to maintain the 2005 deadline. Prematurely depriving consumers of the option to either lease a converter box from the MVPD or purchase such a device at retail would only frustrate competition, innovation and consumer choice. It would also significantly compromise MVPD business plans and slow digital deployment. As correctly explained by Commissioner Powell;

[Section 629] does not mandate in any way, shape or form that we guarantee that retail distribution win out over operator supplied alternatives or that we tip the balance in their favor....The real purpose of section 629 was to ensure that consumers are not hostages to their cable operators and can go elsewhere, if they choose, to obtain set-top equipment. . . We accomplish that objective by mandating that separate security PODS [sic] are available. . . We have not been asked to ensure that consumers switch to devices that become available through retail, only that they have that choice. . . It is quite plausible to me that the "impediment" to switching to retail may in fact be a consumer preference for distributor-supplied integrated boxes! I see no reason to attempt to control consumer

preferences.<sup>8</sup>

It is truly remarkable that the CE industry's complaints have nothing to do with consumers, and everything to do with increasing CE retailers' own ability to dictate the standards to the rest of the participants. Time Warner concurs with Commissioner Powell's acknowledgment that Section 629 was intended not to empower the Commission to force all cable subscribers to obtain their set-top boxes through retail outlets, but rather to provide consumers a choice between lease or purchase.

Until POD-compliant host devices appear on retail shelves, no one can be sure how a market for such devices will develop. It would be grossly premature to even consider banning MVPDs from providing integrated set-top boxes to subscribers until CE retailers begin to place orders for host devices and stock their shelves with such equipment. Then, and only then, can the Commission start to gather hard data regarding the extent of consumer preference for retail purchase of host devices versus lease of integrated boxes from MVPDs, and whether the continued availability of such integrated boxes might, in fact, "impede" retail availability.

Significantly, a phase-out of the availability of integrated boxes from MVPDs would be entirely unjustified if a retail model fails to develop due to factors unrelated to the continued availability of integrated boxes. For example, as integrated boxes currently cost less than those with separate security and non-security functions, the costs associated with commercial host devices may prove prohibitive to widespread consumer acceptance. These cost disparities can be

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<sup>8</sup>*See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order in CS Docket No. 97-80, 13 FCC Rcd 14775 (1998) ("*Navigation Devices Order*") (dissent of Commissioner Michael K. Powell).

ameliorated only if CE retailers place orders for sufficient quantities of POD-compliant host devices to attain comparable economies of scale. Moreover, as retailers have not yet begun to offer host devices, no reliable data exists as evidence that consumers want to purchase such devices at retail, a point even the retailers have acknowledged. In sum, acceleration of the integrated devices ban would deny consumers the ability to choose equipment that may prove more cost-effective and more appropriate for their needs.

Rather than accelerating the ban and reducing consumer choice, the Commission should revisit its rules to ensure that consumers have a full range of navigation device options. Consumers should continue to have the option of obtaining integrated devices from their cable operator after January 1, 2005, assuming cable operators' continued compliance with the other aspects of the Commission's navigation device rules. At a minimum, the Commission should make clear that a cable operator will not be prohibited from offering new integrated devices to subscribers if it continues to make PODs available to consumers who wish to obtain OpenCable-compliant host devices at retail.

### **III. THE CABLE INDUSTRY HAS DONE MORE THAN ITS PART TO ACHIEVE COMMERCIAL AVAILABILITY.**

As was amply demonstrated in the cable operators' comments, allegations that the cable industry has not done its part to achieve the goals of Section 629 are completely unfounded. Foremost, cable operators have satisfied their obligation to make PODs widely available to subscribers. As a result of these efforts, cable operators were able to take delivery of digital POD modules by the Commission-imposed deadline for separation of security and non-security functions -- July 1, 2000. Further, the development of a workable POD standard that

sufficiently balances the interests of all parties was no small feat. CableLabs, together with affected MVPDs and participants from all affected industries, has worked tirelessly to develop practical, workable OpenCable technical specifications necessary to allow the manufacture and retail sale of host devices.<sup>9</sup> All that is needed now is for the consumer electronics retailers to do their part and order POD-compliant host devices from manufacturers and make them available to consumers on retail shelves.

The comments of the CE industry are riddled with the suggestion that cable operators only act upon incentives to forestall retail availability and that the Commission must interfere to adjust those incentives.<sup>10</sup> Such allegations are not only refuted by the cable industry's efforts, but also by the reality of the marketplace. Foremost, cable operators are unquestionably facing stiff competition from DBS providers, and DBS providers currently enjoy significant advantages due to their very successful marketing partnerships with large retail outlets. Because retail outlets profit from the sale of DBS equipment, they have strong incentives to promote DBS equipment and services, and indeed DBS services are often prominently featured in national advertising by CE retailers. The intense competitive pressure from DBS and their retail partners

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<sup>9</sup>See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Status Report in CS Docket No. 97-80 (January 7, 1999) ("January 1999 Status Report"); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Status Report in CS Docket No. 97-80 (July 7, 1999) ("July 1999 Status Report"); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Status Report in CS Docket No. 97-80 (January 7, 2000) ("January 2000 Status Report"); *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Status Report in CS Docket No. 97-80 (July 7, 2000) ("July 2000 Status Report").

<sup>10</sup>CEA comments at 2-8; CERC comments at 7-10, 25-39.

only serves to increase the cable industry's desire and support for the retail availability of cable converter equipment. Cable operators fully understand that having cable equipment available to potential customers in retail showrooms, allowing retailers to promote this equipment on an equal footing with DBS equipment, is an important business objective. To suggest that cable operators have an economic interest in limiting the manner in which they market their services is incorrect. Cable operators have realized that retail distribution of cable compatible devices is in their best economic interest.

Further, the suggestion that the cable industry is in the process of "stockpiling" integrated devices, or that it is "flooding" the market in anticipation of the 2005 ban, is dead wrong.<sup>11</sup> There is absolutely no evidence that cable operators have either "warehoused" digital boxes or accelerated the roll-out of such boxes on any basis other than legitimate consumer demand. Cable operators are service providers, not consumer electronics retailers, and stay in business because they deliver quality content services to their customers. If operators are being aggressive in equipment rollouts, they are motivated by nothing more than a desire and a need to ensure that their customers enjoy the benefits of such services as soon as possible. Cable operators are under enormous pressure, from customer service, public relations and business perspectives, to stay ahead of the technological curve and make sure that their customers receive cutting edge services. Often this means rolling out new technology to deliver those services. Such rollouts have absolutely nothing to do with forestalling set-top box competition from retailers, but have everything to do with meeting the needs of customers and responding to the

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<sup>11</sup>CEA comments at 17-24.

competitive marketplace.

Time Warner can assure the Commission that it has not and will not engage in any "stockpiling" of expensive digital set-top boxes. To the contrary, Time Warner has every incentive to deploy digital boxes to consumers as quickly as possible to satisfy subscriber demand for digital cable services. Indeed, the supply of digital boxes has been inadequate to meet consumer demand, and Time Warner would welcome the retail availability of host boxes as another avenue to satisfy the needs of subscribers.

Section 629 is decidedly pro-consumer, and should not be used in ways that deny consumers access to new technologies and services. This fact demands that the Commission not accelerate the 2005 deadline, and further demands the Commission reconsider it altogether.

#### **IV. CURRENT CIRCUMSTANCES DEMAND THAT THE COMMISSION PUT ADDITIONAL PRESSURE ON THE CONSUMER ELECTRONICS INDUSTRY.**

If Section 629 is to succeed, the CE industry must shoulder an equal burden with the cable industry to take affirmative actions to ensure commercial availability. Because the cable industry has lived up to its responsibilities by establishing the necessary technological standards and making PODs readily available to subscribers, the obligation for ensuring that host devices are commercially available must now fall squarely on the shoulders of the CE retailers. While multiple manufacturers have expressed their willingness to manufacture OpenCable-compliant host devices,<sup>12</sup> CE retailers have thus far failed to make any commitment to place orders for such devices. Simply put, the goal of commercial availability can never be achieved if CE retailers

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<sup>12</sup>See July 2000 Status Report at 11-12 (discussing Motorola's overtures to retailers to manufacture OpenCable compliant digital set-top boxes for July 2000 delivery).

will not do their part by ordering host devices and stocking them in their showrooms. Instead of complaining about standards, it is now time for the CE retailers to put their money where there mouth is and order POD compliant host devices.

Time Warner continues to believe that it is inappropriate for the Commission to micro-manage this process. To the extent, however, the Commission continues to regulate the cable industry in this context, such regulatory burdens should fall equally on all entities whose cooperation is necessary to achieve the objectives of Section 629. If continued regulatory oversight is deemed necessary, then the Commission should establish discreet milestones for the CE retailers to meet and should monitor the CE industry's progress through reporting obligations, just as the top eight cable operators were required to report on their successful efforts to make PODs available. Similarly, so long as the cable industry remains subject to potential regulatory sanctions in this area, the CE industry should be subject to comparable sanctions. Until the Commission finds that CE retailers have fulfilled their obligations in offering retail host devices, it cannot possibly blame the continued availability of integrated boxes from MVPDs as impeding a fully competitive retail environment.

### **CONCLUSION**

The CE industry's complaints in this proceeding are unfounded. Time Warner and the cable industry have worked diligently to meet and exceed Commission expectations and to promote commercial availability of navigation devices. Despite these good faith efforts, CE retailers have yet to place orders for the host devices necessary for the goal of commercial availability of navigation devices to be realized. Until all affected parties bear their share of the responsibility necessary for retail availability to become a reality, not only does acceleration of

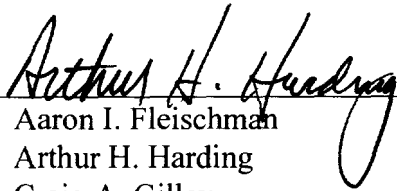


the 2005 deadline remain entirely unnecessary, but present circumstances warrant repeal of the deadline altogether.

Respectfully submitted,

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